

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 113

Docket No. SF-0831-09-0974-I-1

**Marcelino G. Espiritu,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

June 18, 2010

Rufus F. Nobles, I, Zambales, Philippines, for the appellant.

Karla W. Yeakle, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This matter comes before the Board upon the appellant's petition for review (PFR) of an initial decision that affirmed the Office of Personnel Management's (OPM's) August 26, 2009 reconsideration decision denying his application to make a deposit under the Civil Service Retirement System (CSRS). For the reasons set forth below, we DENY the PFR for failure to meet the review criteria under [5 C.F.R. § 1201.115\(d\)](#). However, we reopen the appeal on our own motion under [5 C.F.R. § 1201.118](#), and we affirm OPM's other August 26,

2009 reconsideration decision denying the appellant's application for a deferred annuity.

BACKGROUND

¶2 Effective May 15, 1992, the appellant, a Supervisory Security Clerk stationed at Subic Bay, Philippines, resigned, apparently through an early retirement program. Initial Appeal File (IAF), Tab 5, Subtab 5 at 6. The appellant's resignation SF-50 stated that, because of his years of service, he was "[e]ntitled to lump-sum benefits equivalent to 105% of 25 months basic pay based on 24 years, 10 months and 07 days creditable service with the U.S. Forces Philippines . . . in accordance with FEPI¹. . . ." *Id.* The appellant's resignation SF-50 and his other SF-50s in the record described his retirement coverage in various positions that he held since 1966 as "other" or "none." *See id.*; *see also* IAF, Tab 5, Subtab 3 at 39, 42-48. The appellant did not allege that any Civil Service Retirement contributions were withheld from his pay during his almost 25 years of service.

¶3 The record reveals the following chronology: On February 4, 2009, the appellant completed an Application for Deferred Retirement. *See* IAF, Tab 5, Subtab 5 at 1-7. On March 15, 2009, he completed an Application to Make Deposit for his service from October 1, 1982, until May 13, 1992. *Id.* at 8-10. On April 23, 2009, OPM denied his application for a deferred retirement because the SF-50 that he submitted to OPM "**clearly** shows" that his service was not under the CSRS. IAF, Tab 5, Subtab 4 at 4 (bold and underline in original). On May 7, 2009, OPM denied his application to make a deposit under the CSRS because he was not currently employed in a position subject to federal retirement deductions and he did not have entitlement to an annuity. *Id.* at 1-3. The

¹ The term "FEPI" stands for Filipino Employment Personnel Instructions. *Quiocson v. Office of Personnel Management*, [490 F.3d 1358](#), 1359 (Fed. Cir. 2007).

appellant sought reconsideration of both of OPM's initial decisions. *See* IAF, Tab 5, Subtabs 2 at 3 (noting that the appellant filed a June 29, 2009 reconsideration request regarding his entitlement to an annuity), 3 at 1 (June 8, 2009 reconsideration request regarding the deposit issue). On August 26, 2009, OPM issued separate reconsideration decisions, affirming each of its initial decisions. *See* IAF, Tab 5, Subtab 2 at 1-2 (reconsideration decision denying the appellant's request to make a deposit), 3-6 (reconsideration decision denying the appellant's request for an annuity).

¶4 The appellant filed a Board appeal, challenging both of OPM's reconsideration decisions. *See* IAF, Tab 1. The appellant's representative waived the appellant's earlier request for a hearing, and the record closed. *See* IAF, Tab 7. The administrative judge issued an initial decision based on the written record, and it appears that he only addressed OPM's reconsideration decision regarding the appellant's application to make a deposit. *See* IAF, Tab 10 at 4 (concluding that the appellant was not a current Federal employee and that he was not formerly employed in a position constituting covered service pursuant to 5 U.S.C. chapter 83, finding that he was ineligible to make a deposit for such service, and affirming OPM's reconsideration decision). The appellant filed a PFR and several other PFR submissions, challenging the administrative judge's conclusions, and the agency filed a response. *See* Petition for Review File (PFR File), Tabs 1, 4-7.

ANALYSIS

¶5 Our review of the record reveals no error in the administrative judge's conclusion that the appellant, at the time of his application to make a deposit, was not a current Federal employee and he was not formerly employed in a position constituting covered service under 5 U.S.C. chapter 83, Subchapter III, and thus, he was ineligible to make a deposit for such service. *See* IAF, Tab 10; *see also* [5](#)

[C.F.R. § 831.112\(a\)](#).² Therefore, the administrative judge properly affirmed OPM's reconsideration decision on this issue and we deny the appellant's PFR for failure to meet the review criteria. *See* [5 C.F.R. § 1201.115\(d\)](#).³ However, we reopen the appeal on our own motion under 5 C.F.R. § 1201.118 to address the administrative judge's failure to adjudicate the appellant's claim regarding OPM's reconsideration decision denying his application for an annuity, an issue that does not appear to be raised by the appellant on PFR.

¶6 The appellant clearly indicated in his initial appeal paperwork that he was appealing both of OPM's reconsideration decisions. *See* IAF, Tab 1 at 1 ("I am for appeal [sic] of the [OPM's] final reconsideration decision which denied my claim for both retirement benefits and making a deposit to the Civil Service Retirement and Disability Fund. . . ."). Therefore, the administrative judge erred by failing to address in the initial decision the appellant's appeal of OPM's reconsideration decision denying his application for an annuity. *Spithaler v.*

² The appellant alleges on review, as he did below, that an unpublished U.S. district court decision in *Taylor v. Hampton*, No. 1178-72 (D.D.C. May 2, 1974), and the Board's decision in *Dorry v. Office of Personnel Management*, [35 M.S.P.R. 264](#) (1987), support his case. Decisions in district courts, however, are not binding on the Board. *See, e.g., Boulineau v. Department of the Army*, [57 M.S.P.R. 244](#), 249 n.7 (1993). Moreover, *Dorry*, which relied in part on *Taylor*, is distinguishable from this appeal because the appellant, unlike Ms. Dorry, has not shown that he had any covered service and has not shown evidence of any stipulation or other agreement permitting him to make a deposit despite his status as a retiree, rather than a current employee. *See Dela Rosa v. Office of Personnel Management*, [583 F.3d 762](#), 765 n.3 (Fed. Cir. 2009). Although the appellant further contended below and on review that [5 C.F.R. § 831.112\(a\)](#) is inconsistent with [5 U.S.C. § 8334\(c\)](#), our reviewing court has held that a failure to meet the requirements of section 831.112(a) renders an individual not within the class of persons permitted to make a deposit pursuant to section 8334(c). *Id.* at 765.

³ In reaching this conclusion, we have considered the documents filed with the appellant's PFR submissions, including Department of Defense Instruction No. 1400.10, dated June 8, 1956, and *Andrada v. Office of Personnel Management*, [74 M.S.P.R. 226](#) (1997). *See* PFR File, Tabs 1, 5. However, we have not considered the appellant's March 7, 2010 submission, *see* PFR File, Tab 7, because it was dated and submitted after the close of the record on review. *See* PFR File, Tab 2 (explaining that the record on review closes on February 21, 2010).

Office of Personnel Management, [1 M.S.P.R. 587](#), 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests). We need not remand the appeal, however, because the record is fully developed on this issue.

¶7 In its reconsideration decision, OPM explained that, in order to be entitled to an annuity based on a separation from service, an applicant must have completed a minimum of 5 years of creditable service and, during the final 2 years of service prior to separation, the applicant must serve for at least 1 year in a position that is covered by, or subject to, 5 U.S.C. chapter 83, Subchapter III. IAF, Tab 5, Subtab 2 at 3 (internal citations omitted); *see* [5 U.S.C. § 8333](#)(a), (b). OPM concluded that the appellant's civilian service, from August 25, 1966, to May 15, 1992, was performed under an excepted (non-permanent) appointment, no deductions were withheld from his pay, and thus, he did not have 5 years of "required" service *Id.* at 5. Additionally, OPM determined that he was not entitled to an annuity based on his May 15, 1992 separation because he did not complete 1 year of covered service within the 2 years immediately preceding his separation from this position. *Id.*

¶8 The appellant, as the applicant, bears the burden of proving entitlement to an annuity. *Cheeseman v. Office of Personnel Management*, [791 F.2d 138](#), 140-41 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *see* [5 C.F.R. § 1201.56](#)(a)(2). The appellant has not demonstrated any error with OPM's determinations, below. Irrespective of whether the appellant had the requisite 5 years of creditable civilian service, *see* [5 U.S.C. § 8333](#)(a), his last 2 years of service prior to his separation from the Supervisory Security Clerk position did not include at least 1 year in a covered position, *see* [5 U.S.C. § 8333](#)(b). Notably, the Federal Circuit has indicated that the reference to "other" or "none" in an applicant's SF-50s means that the individual was not employed in covered service. *See, e.g., Rosete v. Office of Personnel Management*, [48 F.3d 514](#), 520

(Fed. Cir. 1995). Moreover, the court has found that receipt of retirement benefits under a non-CSRS plan, such as the FEPI, indicates that the recipient's service was not covered under CSRS. *See Quiocson*, 490 F.3d at 1360.

¶9 Because the appellant's last 2 years of service prior to his separation from the Supervisory Security Clerk position did not include at least 1 year of service in a covered position, we affirm OPM's August 26, 2009 reconsideration decision denying his application for a deferred annuity.

ORDER

¶10 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.